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PETITION NOT PRINTED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 561

JAMES M. BUSHNELL,

Petitioner,

vs.

O. B. ELLIS, Director, Texas Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

PERCY D. WILLIAMS
Counsel for Petitioner
3100 Gulf Building
Houston 2, Texas

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ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

Opinion Below

The Court of Criminal Appeals of Texas denied Petitioner's petition for writ of habeas corpus and motion for rehearing without written order or opinion (R. 44, 47).

Jurisdiction

Petitioner's petition for writ of habeas corpus was denied by the Court of Criminal Appeals of Texas on January 15, 1960 (R. 44). Motion for rehearing was denied by that Court on February 16, 1960 (R. 47). Petition for writ of certiorari was filed on February 25, 1960, and on

December 5, 1960 was granted with leave to proceed *in forma pauperis*. The jurisdiction of this Court rests on 28 U. S. C. 1257(3).

Question Presented

Whether a young, ignorant and indigent defendant is deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution when he is put to trial on a felony charge in a State court, without counsel, and is convicted after the court did not exclude various inadmissible and prejudicial evidence, including an involuntary written confession, and did not limit the jury's consideration of evidence of a prior conviction for another offense.

Constitutional Provision and Statutes Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1257, Title 28, United States Code provides in pertinent part:

> "§1257. State courts; appeal; certiorari
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Section 2106, Title 28, United States Code provides:

"§2106. Determination

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Article 1408, Title XVII, Vernon's Penal Code of Texas provides:

"Art. 1408. Robbery

"If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death or be confinement in the penitentiary for any term not less than five years."

Article 215, Title 5, Chapter 1, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 215. When felony has been committed

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.'

Article 217, Title 5, Chapter 1 (Arrest Without Warrant), Vernon's Code of Criminal Procedure of Texas provides:

"Art. 217. Must take offender before magistrate

"In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

Article 245, Title 5, Chapter 3, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 245. Examining trial

"When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 247, Title 5, Chapter 3, Vernon's Texas Code of Criminal Procedure provides:

"Art. 247. Warning to accused

"Before the examination of the witnesses, the magistrate shall inform the accused that it is his right to

make a statement relative to the accusation brought against him, but at the same time shall also inform him that he can not be compelled to make any statement whatever, and that if he does make such statement, it may be used in evidence against him."

Article 248, Title 5, Chapter 3, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 248. Voluntary statement

"If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. His statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused by affixing his name or mark, but shall not be sworn to by him. The magistrate shall attest by his own certificate and signature to the execution and signing of the statement."

Article 491, Title 7, Chapter 4, Vernon's Code of Criminal Procedure of Texas provides:

"Art. 491. No arraignment

"There shall be no arraignment of a defendant except upon an indictment for a capital offense."

Article 494, Title 7, Chapter 4, Vernon's Code of Criminal Procedure of Texas, as in effect in 1944, provided:

"Art. 494. Court shall appoint counsel

"When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him. The counsel so appointed shall have at least one day to prepare for trial."

Article 494, Vernon's Code of Criminal Procedure of Texas, as amended effective June 1, 1959, provides:

"Art. 494. Court shall appoint counsel

"Whenever it is made known to the court at an arraignment or any other time that an accused charged with a felony is too poor to employ a counsel, the court shall appoint one (1) or more practicing attorneys to defend him.

"The counsel so appointed shall have ten (10) days to prepare for trial, unless such time be waived in writing by said attorneys and the accused."

Article 727, Title 8, Chapter 7, Vernon's Code of Criminal Procedure of Texas, provides:

"Art. 727. When confession shall not be used

"The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name, and signs the statement by making his mark, such statement shall

not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

Section 1, Louisiana Acts 1936, No. 284, now Louisiana Revised Statutes 15:84.1 (1950), Code of Criminal Procedure, provides in relevant part:

"Section 1. Be it enacted by the Legislature of Louisiana, That any member of a duly organized State, county or municipal peace unit of another State of the United States who enters this State in close pursuit, and continues within this State in such close pursuit, of a person in order to arrest him on the grounds that he has committed a felony in such other State, shall have the same authority to arrest and hold in custody such person, as member of a duly organized State, parish or municipal peace unit of this State have, to arrest and hold in custody a person on the ground that he has committed a felony in this State."

Section 2, Louisiana Acts 1936, No. 284, now Louisiana Revised Statutes 15:84.2 (1950), Code of Criminal Procedure, provides:

"Section 2. That if an arrest is made in this State by an officer of another State in accordance with the provisions of Section 1 of this Act, he shall, without unnecessary delay, take the person arrested before a magistrate of the parish in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await, for a reasonable time, the issuance of an extradition warrant by the Governor of this State. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested."

Section 1, Article 60, Louisiana Acts 1928, No. 2, now Louisiana Revised Statutes 15:60 (1950), Code of Criminal Procedure, provides:

"60. Arrest without warrant, when permitted

"Any peace officer may, without a warrant, arrest a person:

"(2) When such person has committed a felony although not in the presence of the officer;

"(3) When a felony in fact has been committed and he has reasonable cause to believe that such person has committed it;

"(4) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it; * * *"

Statement

I.

The Proceedings in the Texas District Court.

A. The Indictment

On February 22, 1944, a grand jury of the District Court of Orange County, Texas, indicted Bushnell for robbery by assault (R. 1-2). The indictment charged that on or about February 12, 1944, Bushnell, by assault upon and violence to H. L. Myers; and by putting Myers in fear of life and bodily injury, took $200.00 from him (R. 1).

B. The Trial

1. *The Plea*

Bushnell pleaded not guilty (R. 35).

2. *The Lack of Representation of Defendant*

At trial Bushnell was not represented by an attorney (R. 33) and acted as counsel for himself (R. 3). He cross-examined four of the six witnesses for the State (R. 9, 10, 12-13, 17, 18, 29, 30, 31, 32). He did not object to any questions asked by the prosecution or to any evidence introduced.

The court reporter recorded the trial proceedings only during the examination of witnesses. The trial record or statement of facts is silent as to whether Bushnell examined the veniremen on *voir dire*, or exercised peremptory challenges, or objected to the instructions to the jury. Any colloquy between the court and the defendant prior to the testimony of witnesses, or in connection with the formulation of the charge to the jury, was not reported. The trial record does not reflect whether Bushnell requested the appointment of counsel, or was informed by the court whether or not he had a right to counsel, or was offered court-appointed counsel. Neither Bushnell nor the court mentioned the matter of defense counsel during the reported proceedings (R. 3-32).

Petitioner, in his petition for writ of habeas corpus in the Court of Criminal Appeals of Texas, alleged that upon calling of the case for trial, he stated to the court that he had no attorney, was too poor to employ counsel, was not familiar with law, and was unable to adequately defend himself (R. 40, 42). He also alleged that he asked the court to appoint counsel to defend him, that such request was denied, and that he did not waive his right to counsel (R. 40, 42).

3. *The Circumstances of Defendant at the Trial*

In his petition for writ of habeas corpus in the Court of Criminal Appeals of Texas, Petitioner alleged that when

tried he was 22 years old and had only a sixth-grade education (R. 41, 42). Petitioner was actually 25 years of age at the time of trial, and the age shown in such petition was apparently a typographical error. At trial the prosecuting witness twice spoke of Bushnell as a "boy" (R. 6), and the district attorney called Bushnell "a young man" (R. 26). The constable who arrested Bushnell testified for the State that Bushnell had said that "he had been shook up in the Army and he was taking Amatol tablets for relief" (R. 31). Bushnell testified on cross-examination that he had been granted a medical discharge from the Army (R. 21), and was taking Amatol "all the time" upon a doctor's prescription, because "It's a nerve medicine. I have moods" (R. 23). The constable also testified that he took whatever money was on the defendant at the time of arrest (R. 12). A deputy sheriff testified for the State that he paid for some telegrams sent by Bushnell from jail (R. 29). Bushnell testified on cross-examination that his mother was sick and not able to come to the trial and that "I don't have a father I can depend on" (R. 25), and that he had no friends at the trial (R. 28). The district attorney asked Bushnell if he had been put in jail shortly after his arrest and had been there continuously until trial, and Bushnell affirmed that he had been (R. 24-25).

4. *The Evidence as to the Alleged Offense*

The State's evidence was a signed statement, including a confession, by Bushnell (R. 16-17), and the testimony of six persons, including four local law enforcement officers. Bushnell was the only defense witness (R. 19-28).

a. *A. L. Myers*

Myers, the prosecuting witness, testified on direct examination (R. 4-10) substantially that: On or about February 12, 1944, when he was going to buy lumber, his

car gave out and slipped into a ditch. He walked into a beer tavern at Vidor, Texas, and got two boys, one of whom was Robert Marshall, to pull him out. Outside the tavern a man, identified by Myers as the defendant, asked whether Myers was alone and other questions, and said to get in defendant's car, that defendant would carry him to get a mechanic. Myers got in the car, alone with Bushnell. Instead of going toward Orange, Bushnell turned down another road. Bushnell gave a drink to Myers, who in a minute began to feel numb and knew he "was doped". Bushnell got a six-shooter, started to stop but went further, then stopped and ordered Myers out. Myers got out; Bushnell cursed him, held the gun on him, and hit him, cutting him to the bone and in three places, leaving scars over his eyes and on his nose. Bushnell threatened to shoot a bullet through Myers' brain and took "everything" from Myers, including about $210 from Myers' billfold, his gas ration tickets and his eyeglasses. Myers stayed in a ditch about 2 or 2½ hours, walked 3½ miles until he was found by a constable, and "might near bled to death". Myers positively identified Bushnell as the man who robbed and assaulted him.

Myers was asked and testified on direct examination as follows:

> A. * * * So they got after him then, asked me his description and I described him and they caught him. He taken about $210.00. I had one $100 bill and the other in $50s; I might have had one $5. They got back $128.00, and he said he spent the other in a gambling dump.
>
> Q. That's Bushnell?
>
> A. Yes, sir (R. 6-7).
>
> * * * * *
>
> Q. You say he took some other possessions?

A. Yes, he taken all my ration books, every ration book I had. We got the A cards, they was on him, and my eyeglasses. He even taken my eyeglasses and hid them, stuck them in the cushion of his car. They got my eyeglasses and A cards, also. * * * (R. 7).

* * * * *

Q. I believe you stated that the officer later returned your gas ration book?

A. Yes, sir, the A. They got them off of him and part of the money.

Q. And some of your money?

A. Some of my money, and my eyeglasses (R. 9).

b. *Clyde (Hop) Williamson*

Williamson, a prosecution witness, was a constable of Orange County, Texas, at the time of the alleged offense and at the time of trial (R. 10-11). On direct examination he was asked the following questions to which he gave the following answers:

A. There was a couple of boys come to me and told me that there was a fellow that picked up Mr. Myers.

Q. Do you know whose those boys were?

A. Robert Marshall, and Stephens.

Q. Is Robert Marshall here?

A. Yes.

Q. Do you know where Stephens is?

A. He is in the army.

Q. All right.

A. So they said that they saw him with a gun and said he turned off the wrong way to get him home, and said "Hop, you better look and see about it; it don't look right". So I got to hunting him. * * * (R. 11).

Williamson testified that on the road he found Myers, who was "all beat up", "dirty and bloody and didn't have his good sense, hardly", and that Myers told Williamson what had happened (R. 11). Williamson testified he started looking for Bushnell, ran him to Louisiana and caught him, then brought him back and searched him (R. 12). He testified that he got from Bushnell money, and gas coupons and glasses which were given back to Myers (R. 12). On redirect examination Williamson was asked and answered as follows:

> Q. Why were you looking for him that night?
>
> A. Because I had the information on him that he was the man that robbed Mr. Myers (R. 31).

c. Robert Marshall

On direct examination Marshall testified for the State substantially as follows: He and a boy friend, Kenneth Stevens, were in a beer parlor in Vidor, where Myers asked them to pull his car out of the ditch and they pulled him out. Bushnell had been inside and had come out and got in a car. Myers was drinking a beer and went over to Bushnell's car and left with him. Marshall identified Bushnell as the man that Myers left with (R. 13-14). Marshall also was asked and testified as follows:

> Q. All right, what did you do then?
>
> A. Kenneth said "I don't believe he was taking him home; let's go and tell Hop to watch and see where he went." * * * (R. 14).

d. H. L. Standfield

Standfield, sheriff of Orange County (R. 19) and a witness for the State, was asked and testified on direct examination as follows:

Q. Do you know anything about a pocketbook belonging to Mr. Myers?

A. Well, there was a deputy from—I believe it was Kountze, rang me and said he had found it, with some—and that two boys had brought it to him and said they found it between Terry and Connell.

Q. And that was a pocketbook that was identified as belonging to Mr. Myers?

A. That's right (R. 19).

c. Defendant Bushnell

While cross-examining Myers, Bushnell denied that he robbed or had ever seen Myers (R. 9) or that he had ever owned a gun (R. 10), and testified that on the night of the robbery he was "delirious", "passed out" and "was taking medicine", and that he remembered nothing about it (R. 9).

On direct examination Bushnell testified that on the night of the alleged robbery he was in the tavern at Vidor, drank rum and beer, took some "femotal", remembered nothing thereafter, and woke up in his car "over there by Louisiana" (R. 19-20). He testified that he then drove to Lake Charles, Louisiana, had breakfast there, and was arrested when coming back home to DeQuincy, Louisiana (R. 20).

On cross-examination, Bushnell repeatedly said under persistent questioning that he was not guilty (R. 21, 24, 27). He again said he "passed out in that place" (R. 21). He stated several times that he was framed (R. 21, 22, 24) and that he had never seen Myers (R. 21, 24). He stated that he did not beat Myers (R. 21, 27), did not take money from him (R. 21) or his glasses or ration books (R. 24, 27, 28), did not get Myers into Bushnell's car (R. 21, 24, 27), and did not give him liquor with amatol (R. 21). Bushnell denied that he had told county attorney Sexton that he

robbed Myers (R. 22), and denied that after arrest he had said that he wanted to plead guilty (R. 26).

f. Louis York

York, a deputy sheriff of Orange County (R. 28-29) and a rebuttal witness for the State, was asked and testified for the State, with respect to Bushnell:

> Q. Do you remember the last term of Court, he offered himself as wanting to plead guilty?
>
> A. He did (R. 29).

g. The Written Statement by Bushnell

During the State's case in chief, W. P. Sexton, County Attorney of Orange County at the time of trial and at the time of the alleged offense (R. 15), testified that he took a statement from Bushnell (R. 15-16), which was introduced as State's Exhibit No. 2 (R. 16). The statement is as follows (R. 16-17):

> "I, James M. Bushnell, being in the custody of Hop Williamson, Constable of Precinct No. Four, Orange County, Texas, and having been warned by W. P. Sexton, the person to whom the hereinafter set out statement is by me made, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on the trial for the offense concerning which this statement is made, do here make the following voluntary statement in writing to the said W. P. Sexton, to wit:
>
> "My name is James M. Bushnell and I am twenty-five years of age. On the night of February 12, 1944, I was at Vidor, Texas, at a beer joint. While at this beer joint I drank quite a bit of rum and beer and took some amatol tablets. I then left the place and a man whose name I do not know got in the car with me. I rode down a side-road from Highway #90 approx-

imately three miles. I then robbed this man and took what money he had on his person from him, which was approximately $200.00 in currency. During the robbery I hit him with a beer bottle and struck him with my fists. I then put him out of the car and then drove to Orange, Texas; I was arrested just across the Sabine River Bridge by Mr. Hop Williamson and Mr. I. W. Thompson. I returned from Louisiana voluntarily with Mr. Hop Williamson. I was convicted in the State of Louisiana for swindling with worthless checks approximately three years ago and served a term in the Louisiana State Penitentiary.

"I make this confession voluntarily and I was not coerced or threatened by Mr. Williamson or Mr. Thompson or by Mr. Sexton, the County Attorney, in the making of this statement. The same is true in every respect and I realize that by the making of this voluntary statement that the same can be used against me on my trial. Witness my hand this 14th day of February, 1944.

/s/ James M. Bushnell"

5. *The Oral Testimony as to Whether Bushnell's Signed Confession Was Voluntary*

The alleged robbery of Myers occurred on the night of Saturday, February 12, 1944 (R. 1, 4, 7, 8, 19), at about 10:30 P.M. or midnight (R. 8, 9). Constable Williamson testified that he found Myers about 4:00 or 4:30 thereafter and then started looking for Bushnell (R. 11). The constable went to several places where Bushnell had stayed, and near a hotel by the depot saw Bushnell and "run" him to Louisiana "until we caught him" (R. 12). When asked by the district attorney whether he was jailed some 12 or 15 hours after the robbery, Bushnell testified without contradiction that he was put in at 5 A.M. on Sunday

(R. 24), February 13, 1944. Bushnell's confession was signed on the following day, February 14 (R. 17).

Bushnell testified that constable Williamson and an officer Thompson arrested him in Louisiana (R. 20, 26) after they shot at the back of his car (R. 26), and this was not disputed. Petitioner asserted four times that the constable jerked him out of the car on a Louisiana highway and beat him over the head (R. 13, 20, 26). Although the constable testified that "I never touched you over there" in Louisiana (R. 12), the State did not attempt to show that Bushnell was not jerked from his car and beaten in Louisiana, by someone. When the constable was asked by Bushnell whether the constable, at the time of the arrest, put Bushnell in a car that belonged "to this other guy that run me down first and beat me and stomped me" and later put Bushnell in the constable's own car, the witness admitted that "The man was Lee Anderson and he owns a grocery store" (R. 31-32). The constable had previously testified that "They was helping us trying to stop him at the hotel, and we brought him back" (R. 31).

The constable testified that he had arranged for a Louisiana officer to "run" Bushnell across the State line, and that such officer "said he would follow him and back us up" (R. 31). The constable testified that when he caught Bushnell, he asked Bushnell if he wanted to let the Louisiana officer "run him across or come on back, and he said, 'I'll come on back'" (R. 31). The constable testified that he took Petitioner to the police station at Orange when he came back (R. 31) and put him in jail (R. 12).

Petitioner testified twice that at the police station the constable and officer Thompson tried to get him to confess and beat and stomped him on the floor (R. 20, 27). He testified: "I was beat worse than a dog: then when they got through beating, they taken me in an office and sat me

in a chair and knocked me down. He said 'I'm going to slap you—I'd like to kill you, but I want to do it the right way.' He knocked me out twice and when they got through knocking me around, they threw some water on me, and then they threw me down the stairs" (R. 20). None of such testimony was denied. The constable admitted using force against Petitioner at some time; when asked by Petitioner whether "you beat me up across in Louisiana", the constable testified "I never touched you over there" and "I ain't touched you but once" (R. 12-13). When asked by Bushnell if he "beat me up without mercy", the constable answered, "It wasn't over in Louisiana" (R. 12, 13). After the constable so testified on cross-examination, the State excused the witness (R. 13). When the constable was recalled on rebuttal, the district attorney did not ask him whether he or anyone else beat or stomped Bushnell but asked him only whether he or Thompson "put these scars on his body" or "hit him or beat him in any way to make those scars", to which the constable answered in the negative (R. 31).

It was undisputed that Bushnell was taken to the office of the county attorney, Mr. Sexton, to make the signed statement (R. 18, 30). The county attorney, when asked if Bushnell then looked like he had been abused, answered, "He was—he had a bandage on his head, yes, sir" (R. 18). Bushnell testified without contradiction that at that time he could not see out of his eye (R. 18, 22), and that his nose and eyes were bleeding (R. 30). When Bushnell, attempting to cross-examine county attorney Sexton, stated that he was threatened in Sexton's office about the statement, and asked if that was right, the county attorney did not deny that a threat was made but evaded Bushnell's question by asking Bushnell, "You didn't tell me anything about it, did you?" (R. 17). When Bushnell then stated to the county attorney that the constable had threatened at that time to tie and cow-whip him, and asked the witness if that

was right, the county attorney did not deny it but said only, "I didn't hear that" (R. 17). The district attorney then asked the county attorney whether Bushnell told the county attorney at the time of the statement about being mistreated or abused or forced to make the statement (R. 18), but did not ask if Bushnell was threatened or forced to make it. On re-cross examination of Mr. Sexton, when Bushnell said that in Mr. Sexton's office "they said I had to sign a statement, said that day if it wasn't signed, they would get it one way or the other", Mr. Sexton answered that "no such conversation as that took place" (R. 18). Bushnell testified on cross-examination that he first told the county attorney he did not rob Myers, but that officer Thompson then said "You just as well say you did, or we will get it out of you" (R. 22). Bushnell testified that at the time of such statement by Thompson, the county attorney "was there, but he was called off to talk to two ladies who was outside in the lobby" (R. 22). Bushnell repeated that he was told he had to say he did it (R. 24) and that he had to give the statement (R. 27). The State introduced no evidence, other than a confession itself, contradicting such testimony that he had to give the statement and was told that he had to, although the county attorney testified that Bushnell said that the statement was true (R. 18). Bushnell's testimony that he showed the county attorney a "rupture they gave me" and scars on his back and that he couldn't read at the time the statement was given, was denied by the county attorney (R. 15, 30).

The district attorney, when cross-examining Bushnell, assumed that he had been subjected to violence by the officers, and condoned it in the following interrogation (R. 26-27):

> Q. And you don't know the reason why Williamson and Thompson was looking for you?

A. They didn't say nothing, they run up and as soon as my car—I stopped, they jerked me out and beat me up, and over the head, out in the highway.

Q. Do you think it was right for a young man like you to take an old 59-year-old man and beat him out, put a bunch of scars on his face, take his money and hit him? But the officers has to get a little bit rough with you and you don't think that's right, is that the ticket?

A. No, they don't have the right to do me like that.

Q. They did you like they should have done you.

A. No, they shouldn't have beat me and stomped me in the police station.

Q. Why?

A. Because they shouldn't. Not while I was still in Louisiana, and get me and stomp me.

Q. I guess you think you did what you should have done to Mr. Myers?

A. I didn't do it.

Q. Suppose you had—would you have said it was right to do it?

A. I never done it.

Q. What kind of treatment would you be in favor of giving a man that would beat Old Man Myers up as he said he was beaten up?

A. All I can say, I didn't do it.

Q. You are not answering my question.

A. That is all I care to say.

Q. What kind of treatment would you be in favor of for such a man?

A. I wouldn't be in favor of beating him up like a dog, like they done me. I begged for mercy.

Q. You think they gave you mercy?

A. No.

Q. Just like you meted out to Mr. Myers, or would have to anybody else?

A. I didn't do anybody like that.

There is no suggestion in the record that any warrant for Bushnell's arrest had been issued, and Bushnell testified without contradiction that he was arrested "without a permit" (R. 20), "without a license" (R. 23). It is inferable from the trial record as a whole that prior to the time Bushnell signed the written statement, the officers did not take him before a magistrate for an examining trial.

6. The Conduct of the Trial Judge

When Bushnell was cross-examining Myers and attempted to testify himself, the court instructed defendant: "You may not testify. You can tell that when you take the stand" (R. 9); and again to "just ask questions" (R. 9); and again: "You can testify to that when you get on the stand" (R. 10). While Bushnell was cross-examining constable Williamson, the court said, "You can testify to that when your turn comes up" (R. 12). So far as is shown in the statement of facts, the court gave no other instructions nor any warning to Bushnell. The only assistance given Bushnell by the court was during cross-examination of county attorney Sexton, when the court directed the defendant to ask the witness whether he knew Bushnell was threatened in his office (R. 17). The court did not ask any question of any witness.

7. The Cross-Examination of Bushnell as to Character and Reputation

Bushnell was asked the following questions by the district attorney and gave the following answers, on cross-examination:

> Q. I thought you had been in the State Penitentiary for three years, in Louisiana?
>
> A. I know, there are a lot of things that people thought.

Q. Well, that isn't true, you haven't been in the penitentiary?

A. I been to a house of correction.

Q. You weren't in the penitentiary for three years?

A. No, sir.

Q. How long were you there?

A. Eight months.

Q. Why did you tell Mr. Sexton you were there approximately three years?

A. I told him—when I came in his office my head was swimming. I couldn't see out of my eye. You see, I'm black under my eyes. He asked me had I been in and I told him I been in a house of correction eight months (R. 21-22).

* * * * *

Q. Can't you tell the sheriff to serve subpoenas on the witnesses? Can you ask the county?

A. I got some letters—I wrote to my sister and my mother.

Q. They didn't receive them?

A. Nobody knows if the mail got out.

Q. They are not interested enough to come over here and look after you?

A. She's not able.

Q. You don't have anybody interested enough in you to come over?

A. My mother does (R. 25).

* * * * *

Q. You don't have any friends at all?

A. I have friends.

Q. Where are they? In Louisiana? None of them are here.

A. No, I don't have them right here. I couldn't make a call, anyway (R. 28).

8. *The Charge to the Jury*

The court's charge to the jury included the following instruction:

> "You are further instructed that unless you believe from the evidence beyond a reasonable doubt that prior to the time the defendant made and signed the written statement introduced in evidence, if he did, that he, the defendant, was properly warned by the officer to whom said statement was made, first, that he did not have to make any statement at all; and second; that any statement made by him, the defendant, may and could be used in evidence against him on a trial for the offense concerning which it was made, and after being so warned, he voluntarily and without coercion, persuasion, inducement or promise of immunity of any kind, made the statement introduced in evidence, and unless you so believe, or if you have a reasonable doubt thereof, you will disregard such statement for any and all purposes and all parts thereof and consider the same for no purpose" (R. 50-51).

No instruction was given with respect to the defendant's oral confessions introduced in the testimony of Myers and deputy sheriff York, or excluding any other evidence from consideration, or limiting consideration of the evidence of defendant's prior conviction to the issue of his credibility.

9. *The Verdict, Judgment and Sentence*

The Jury found Bushnell guilty and assessed his punishment as 35 years (R. 34). The court entered judgment on the verdict (R. 35-36), and imposed sentence of not less than 5 nor more than 35 years in the penitentiary (R. 37). No motion for new trial was made (R. 36), and no appeal was taken.

II.

The Petition for Writ of Habeas Corpus.

Petitioner collaterally attacked the judgment of the District Court by petition for the writ of habeas corpus in the Court of Criminal Appeals of Texas (R. 39-44). Petitioner there asserted that the judgment is void under the Constitution of Texas and the Sixth and Fourteenth Amendments to the United States Constitution (R. 39), but the only "question presented" to that Court was whether due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution was violated in that Petitioner was forced to trial without court-appointed counsel (R. 40). Petitioner stated that "being forced to trial without appointment of counsel, and his incapability of representing himself adequately, resulted in him being taken advantage of" (R. 43). Attached to the petition were copies of the indictment, jury verdict, judgment, sentence, and a certificate of the court clerk to the effect that Petitioner had no attorney at trial (R. 40).

In his "Petition for Rehearing" in that Court, Petitioner asserted that "a confession taken during a period of illegal detention, and . . . extracted by coercion and duress at the hands of Orange County officers" was admitted in evidence at his trial (R. 45). Petitioner stated that he was arrested without a warrant and was never taken before a magistrate as required by Article 217 of the Code of Criminal Procedure of Texas, and "[illegible] injury arising therefrom, said confession was extracted by physical abuse of Petitioner . . . administered by the Orange County police officers" (R. 45-46). Petitioner asserted that had he been afforded assistance of counsel, objection could have been made to the admission of the confession (R. 46).

After Petition for Writ of Certiorari was filed in this Court, the reporter's shorthand record of the proceedings at Petitioner's trial was transcribed (R. 32).

Summary of Argument

The record of the proceedings at Petitioner's trial on the serious charge of robbery by assault shows without dispute that Petitioner, an emotionally disturbed young man of 25, without funds or friends, was tried without the assistance of counsel, after having pleaded not guilty. His handicap of ignorance, in acting as his own counsel, was apparent throughout the trial. The district attorney improperly subjected Petitioner to humiliating interrogation to show that he was a merciless person of bad reputation, and the trial judge did not stop such questioning or otherwise materially assist or protect Petitioner. The State introduced in evidence a signed confession which Petitioner repudiated at the trial. Defense counsel could have successfully objected to such evidence on the ground that it had been coerced, in view of admissions at the trial that Petitioner had been physically abused and injured by peace officers trying to get the confession, and in view of Petitioner's uncontradicted testimony that he had been threatened by one of the same officers immediately before signing the confession. The court nevertheless permitted the jury to find that the confession was voluntary and to consider it as evidence. The State also introduced, and the jury was permitted to consider, inadmissible evidence of two oral confessions attributed to Petitioner and much other excludible hearsay testimony. Damaging evidence of a prior conviction of Petitioner should have been limited to the purpose of impeaching his credibility, but the court did not so limit it.

On this record Petitioner's conviction and sentence, entered by the Texas court after failure or refusal to ap-

point defense counsel, deprived Petitioner of due process of law and are void under the Fourteenth Amendment to the United States Constitution. Since the record conclusively establishes the material allegations of Petitioner's petition for the writ of habeas corpus, and no further development of the facts is necessary on remand, this Court should hold that Petitioner is entitled to the writ as prayed for in the Court of Criminal Appeals of Texas.

ARGUMENT

The State Court's Conviction of Petitioner on the Charge of Robbery by Assault, After the Court's Refusal or Failure to Appoint Defense Counsel, Deprived Petitioner of Due Process of Law Because He Was Unable to Protect Himself at Trial in View of His Youth and Ignorance, the Conduct of the Court and the Prosecuting Attorney, and Complex Problems as to the Admissibility and Purpose of Evidence.

Indicted for a grave offense, Petitioner was tried without the assistance of counsel, convicted, and sentenced to a severe term in prison. At trial, he was seriously prejudiced by the following errors which an attorney could have prevented:

a. *The court's charge to the jury permitted the jury to find that Petitioner's written confession was voluntary, and to consider it as evidence of guilt, when such confession should have been excluded on the undisputed facts.*

That Petitioner's signed confession (R. 16-17) was obtained by physical violence and threats is shown by undisputed evidence in the trial record, discussed in Paragraph I.B. 5 under "Statement", *supra*.

Petitioner's arrest in Louisiana, by a Texas county peace officer, was without a warrant (R. 20, 23, 26). Such arrest,

by the Texas officer acting as such, could have been lawful under Louisiana law only if Petitioner had committed a felony and was arrested after a close pursuit from Texas. Louisiana Laws 1936, No. 284, Sec. 1.[1] Assuming, *arguendo*, that Petitioner was lawfully arrested after close pursuit, as claimed in the arresting officer's testimony (R. 12, 31), Petitioner was entitled to be taken without unnecessary delay before a local Louisiana magistrate for examination and commitment to await extradition. Louisiana Laws 1936, No. 284, Sec. 2. If Petitioner in fact agreed to return with the Texas officer, as the officer claimed, and thereby waived his rights to an immediate hearing in Louisiana and to extradition, Petitioner did so after being beaten and when given the alternative of being "run across" to Texas by a Louisiana officer (R. 31-32).[2] After Petitioner was

[1] The Louisiana statute cited in the text gives an out-of-state peace officer in close pursuit the same authority as a Louisiana officer has to arrest "a person on the ground that he has committed a felony" in Louisiana. A Louisiana officer may arrest without a warrant on such ground when "such person has committed a felony although not in the presence of the officer". La. Acts, 1928, No. 2, Sec. 1, Art. 60.2. Under Texas law a county peace officer has no authority as such to make an arrest outside his county. See cases cited in *Ward* v. *Texas*, 316 U.S. 547, 552, n. (1942). Where the offense was not committed within his presence or within his view, a Texas county peace officer may make an arrest without a warrant only on satisfactory proof that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant. Art. 215, Vernon's Code of Criminal Procedure of Texas.

[2] Even if Petitioner was unlawfully seized in Louisiana or unlawfully returned to Texas without extradition, this would not have been a defense to the prosecution. *Brooker* v. *State*, 26 Tex. App. 121, 9 S.W. 735 (1888); *cf. Ex parte Davis*, 51 Tex. Cr. R. 608, 103 S.W. 891 (1907); *Pettibone* v. *Nichols*, 203 U.S. 192 (1906). Nor is it probable that under Texas law a coerced waiver of extradition without assistance of counsel would have been a defense to the prosecution or a ground for release of Petitioner. *Cf. Ex parte Harrelson*, 97 Okla. Cr. R. 399, 264 P.2d 1004 (1953); *In re Charles*, 344 P.2d 1118 (Okla. Cr. App. 1959). Unlawful arrest has never been recognized as a defense to a criminal prosecution in Texas. See Note, 56 A.L.R. 260 (1928).

returned to Texas, he was jailed and violently beaten (R. 12-13, 18, 20, 26-27). The officers failed to take him before a Texas magistrate on the day following, a Monday, as required by Article 217 of the Texas Code of Criminal Procedure, for an examining trial at which he could have made a voluntary statement, after being warned by the magistrate, as required by Articles 245 and 247 of the Code of Criminal Procedure, and under the safeguards imposed by Article 248 of that Code. Instead, Petitioner was taken before the county attorney to sign a confession (R. 15-17). Although illegal acts of peace officers leading up to a confession "do not furnish the answer to the constitutional question", *Lisenba* v. *California*, 314 U.S. 219, 235 (1941), the failure of arresting officers to take the accused before an examining magistrate, as required by Article 217 of the Texas Code of Criminal Procedure, has been considered by this Court in determining whether a confession was forced. *Ward* v. *Texas*, 316 U.S. 547, 552 (1942); *cf. Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

The brutal mistreatment of Petitioner was begun when he was apprehended, by a person who helped a constable run him down (R. 31-32), and was continued at the police station either on the same day or the following day, by the arresting constable and another peace officer who were trying to get a confession (R. 20, 27, 31-32). On the day after his arrest and upon being further threatened by the constable, Petitioner signed the confession (R. 17, 22), although he had first told the county attorney who took his statement that he did not commit the robbery (R. 22). Under these circumstances Petitioner's signed confession "was not free and voluntary but was the product of

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[1] When an arrest is made on Sunday, Article 217 of the Code of Criminal Procedure does not require the arresting officer to take the accused before a magistrate until Monday. See *Gilbert* v. *State*, 162 Tex. Cr. R. 290, 284 S.W. 2d 906 (1955).

coercion and duress", for Petitioner "was no longer able freely to admit or deny or refuse to answer". *Ward* v. *Texas*, *supra*, 316 U.S. 547, 555 (1942).

The confession was properly excludable under decisions of this Court. *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Ward* v. *Texas*, *supra*, 316 U.S. 547 (1942). Under the principle reaffirmed in *Payne* v. *Arkansas*, *supra*, 356 U.S. 560, 568 (1958), Petitioner's signed confession could have been excluded on objection of counsel:

> "But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession, vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

The written confession was also inadmissible under Article 727 of the Code of Criminal Procedure of Texas, which requires that any confession be made "in the voluntary statement of accused". Under that Article, when an officer at the trial admits having struck the prisoner shortly before the confession, the confession is inadmissible over objection; the court is required, on request, to exclude from the jury's consideration any such confession which has been introduced; and submission to the jury of the issue of voluntariness is error. *Williams* v. *State*, 88 Tex. Cr. R. 87, 225 S.W. 177 (1920); *Thompson* v. *State*, 124 Tex. Cr. R. 440, 63 S.W.2d 849 (1933); *Alston* v. *State*, 132 Tex. Cr. R. 130, 102 S.W. 2d 428 (1937); *Sigler* v. *State*, 139 Tex.

Cr. R. 167, 139 S.W. 2d 277 (1940); *Allgood* v. *State*, 141 Tex. Cr. R. 327, 148 S.W. 2d 433 (1941); *Vaughn* v. *State*, 145 Tex. Cr. R. 115, 166 S.W. 2d 139 (1942). Upon objection to the proffered confession as having been coerced, the court would have been required to hear, in the absence of the jury, the evidence relating to voluntariness and to make a preliminary determination of that issue. *Bingham* v. *State*, 97 Tex. Cr. R. 594, 262 S.W. 747 (1924); *Cazazos* v. *State*, 143 Tex. Cr. R. 564, 160 S.W. 2d 260 (1942); *Davis* v. *State*, 165 Tex. Cr. R. 456, 308 S.W. 2d 880 (1957).

The failure of the arresting officers to take Petitioner immediately before an examining magistrate, as required by Article 217 of the Texas Code of Criminal Procedure, would have raised an additional State ground for exclusion of the confession, *Vaughn* v. *State*, *supra*, if it had been established by Petitioner that such failure "caused or contributed to bring about the confession". See *Dimery* v. *State*, 156 Tex. Cr. R. 197, 240 S.W. 2d 293, 295 (1951); *Golemon* v. *State*, 157 Tex. Cr. R. 534, 247 S.W. 2d 119, 124 (1952).

b. *Excludable evidence of oral confessions by Petitioner was admitted.*

The rebuttal testimony of deputy sheriff York that defendant "offered himself as wanting to plead guilty" (R. 29), amounted to the introduction of an unwarned and unsigned confession of guilt made while defendant was under arrest. Under Article 727 of the Texas Code of Criminal Procedure, the admission of such confession over objection would have been reversible error. *Dean* v. *State*, 72 Tex. Cr. R. 247, 161 S.W. 974 (1913) (agreement to plead guilty, *held*, inadmissible); *Stafford* v. *State*, 125 Tex. Cr. R. 174, 67 S.W. 2d 285 (1934) (offer to plead guilty, *held*, inadmissible). If not admissible as original evidence, such

evidence was not admissible for impeachment. *Pierson* v. *State*, 145 Tex. Cr. R. 388, 168 S.W. 2d 256 (1943).

The testimony of prosecuting witness Myers, when asked about the recovery of part of his money, that defendant "said he spent the other in a gambling dump" (R. 6), was evidence of an unwarned and unsigned confession, made when in the custody of an officer or under arrest, and inadmissible under Article 727 of the Texas Code of Criminal Procedure. Its admission over objection would have been reversible error. *Cf. Willoughby* v. *State*, 87 Tex. Cr. R. 40, 219 S.W. 468 (1920); *Dennis* v. *State*, 141 Tex. Cr. R. 504, 148 S.W. 2d 1098 (1941); *Kanz* v. *State*, 166 Tex. Cr. R. 14, 310 S.W. 2d 583 (1958).

x. The court failed to limit the jury's consideration of evidence of Petitioner's prior conviction to the purpose of impeaching his credibility, when such evidence was not admissible for any other purpose.

The statement in Petitioner's written statement (State's Exhibit No. 1, R. 17) that he had been convicted in Louisiana for swindling with worthless checks and served a term in the Louisiana State Penitentiary, was not admissible at the stage of trial at which it was admitted, before Petitioner took the stand. After Petitioner testified, such evidence of prior conviction, together with Petitioner's oral testimony on cross-examination as to such prior imprisonment (R. 21-22), should have been limited to the purpose of impeaching his credibility. *Mahoney* v. *State*, 33 Tex. Cr. R. 388, 26 S.W. 622 (1894); *Sexton* v. *State*, 33 Tex. Cr. R. 416, 26 S.W. 833 (1894); *Hutton* v. *State*, 33 S.W. 969 (Tex. Cr. App. 1896); *Roberts* v. *State*, 44 Tex. Cr. R. 267, 70 S.W. 423 (1902); *Navarette* v. *State*, 103 Tex. Cr. R. 449, 281 S.W. 863 (1926). Petitioner was entitled to a charge that the jury could consider such evidence only

for such limited purpose, and the failure of the court to give such charge, whether or not requested, was reversible error. *Sexton* v. *State*, *supra*; *Hutton* v. *State*, *supra*. It could hardly have occurred to Petitioner not to take the stand, so as to preclude admission of evidence of his prior conviction, after the trial judge had repeatedly indicated to Petitioner that the time for his testimony would be when it came his turn to take the stand (R. 9, 10).

d. *The court failed to instruct the jury to disregard the evidence of Petitioner's character or reputation, or to reprimand the district attorney for opening up the matter, when Petitioner had not raised the issue of his character.*

Petitioner on cross-examination was subjected to humiliating interrogation which improperly raised the issue of his character and reputation. After Petitioner had testified that he begged for mercy from the peace officers, the prosecutor asked, "Just like you meted out to Mr. Myers, or would have to anybody else?" (R. 27). Petitioner was also asked what had kept him "from getting these witnesses you've told us about", and whether he had "anybody interested enough in you to come over" (R. 25), and "You don't have any friends at all?" "Where are they? In Louisiana? None of them are here" (R. 28). Such interrogation, when Petitioner had not placed his character or reputation in issue, was improper. The court on its own motion should have promptly reprimanded the district attorney for asking such questions and instructed the jury to disregard such questions and any evidence of character or reputation so obtained. Failure to do so was reversible error. *Childress* v. *State*, 92 Tex. Cr. R. 215, 241 S.W. 1029 (1922); *Day* v. *State*, 117 Tex. Cr. R. 173, 34 S.W. 2d 871 (1931); *cf. Pollard* v. *State*, 33 Tex. Cr. R. 197, 26 S.W. 70 (1894).

c. Much excludable hearsay evidence was admitted.

The testimony of Myers that his stolen ration book and eyeglasses "was on" Petitioner, and that the officer got them and money "off of" defendant or from his car (R. 7, 9) was hearsay, since it is inferable from the record that Myers was not present at the time of recovery of such articles and was testifying to information received from another. Although constable Williamson later testified that he recovered the articles from defendant, Myers' testimony on the matter could have been excluded. *Massie* v. *State*, 27 Tex. App. 577, 11 S.W. 638 (1889). Likewise inadmissible was Myers' hearsay testimony that his pocketbook was sent back to the sheriff's department from Longview (R. 7) and that an officer could tell of any connection the defendant had with anybody at Longview (R. 10). All of Sheriff Standfield's testimony, which related only to his conversation with an out-of-town deputy who said two boys had found Myers' pocketbook on a road, was inadmissible hearsay (R. 19). Such testimony tended to bolster the constable's testimony that defendant said he threw away the billfold (R. 12).

Other hearsay evidence to which objection could have been made was: the testimony of constable Williamson that the boys Marshall and Stevens had said to him, after Myers allegedly rode off with defendant, "you better look and see about it; it don't look right" (R. 11); the testimony of Marshall that Stevens, seeing Myers and defendant leave together, said, "I don't believe he was taking him home; let's go and tell Hop to watch and see where he went" (R. 14); and Williamson's statement that he was looking for defendant because "I had the information on him that he was the man that robbed Mr. Myers" (R. 30).

Petitioner denied that he committed or was present at the robbery, and did not raise any issue of temporary in-

sanity, although he testified that prior to the time of the alleged robbery, he had been drinking rum and beer and taking femotal, and had been delirious and passed out (R. 9, 19). It should be noted, in evaluating complexities of Texas law with respect to defenses which Petitioner conceivably might have raised, that under Article 36 of the Penal Code of Texas temporary insanity produced by voluntary recent use of liquor or narcotics or a combination thereof is not an excuse for an offense, but evidence of such temporary insanity may be introduced in mitigation of the penalty. See 1 Branch's Annotated Penal Code of Texas (2d ed. 1956) pp. 53-59. However, it seems a defendant is entitled to acquittal on a finding of temporary insanity resulting from the use of whisky mixed with a drug. *Parker* v. *State*, 91 Tex. Cr. R. 68, 238 S.W. 943 (1922); 12 *Tex. Jur.* pp. 300-301.

At Petitioner's trial the judge suggested to Petitioner one question to be asked of a witness (R. 17) but otherwise gave him no assistance. The court showed shocking unconcern for Petitioner's rights, allowing the district attorney to pursue improper lines of questioning that condoned the beatings inflicted on Petitioner (R. 26-27) and presented Petitioner to the jury as a merciless and friendless person (R. 25, 27, 28). The failure of the court to give Petitioner the protection to which he was entitled in the charge to the jury was inexcusable.

Petitioner when tried was 25 years old, but was younger than the petitioner in his thirties whose right to counsel in a non-capital felony case was held to have been denied in *Gibbs* v. *Burke*, 337 U.S. 773 (1949). Petitioner's immaturity, his condition as an emotionally disturbed person, and his ignorance of how to protect himself at trial, are apparent throughout the record.

In view of Petitioner's youth and ignorance, the indifference of the trial judge, the callous questioning by the

prosecutor, and the prejudicial consequences to Petitioner of being tried without the assistance of counsel, this case is controlled by the principle recently restated by this Court in *Cash* v. *Culver*, 358 U.S. 633, 637 (1959):

> "'Where the gravity of the crime and other factors —such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial. *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441. Of particular relevance here are the decisions of the Court which have held the appointment of counsel necessary to a fair trial because of the complexity of the proceedings. *Rice* v. *Olson*, 324 U.S. 786; *Gibbs* v. *Burke*, 337 U.S. 773; and see *Williams* v. *Kaiser*, 323 U.S. 471, 475-476."

The Court of Criminal Appeals of Texas should have ordered a development of the facts alleged by Petitioner, as it did in *Ex parte Bush*, 166 Tex. Cr. R. 399, 313 S.W. 2d 287 (1958). That Court did not have before it the statement of facts (R. 3-32) or the jury charge (R. 49-51) which have been placed in the record since the filing in this Court of Petition for the Writ of Certiorari.

Upon review of habeas corpus cases involving a state court conviction, without defense counsel, of a non-capital felony, this Court, in cases where it had the full trial record before it and the petitioner's allegations were established by that record, has concluded that the conviction could not stand. *E.g.*, *Townsend* v. *Burke*, 334 U.S. 736 (1948); *Gibbs* v. *Burke*, *supra*. In other such cases, where the trial record was not before this Court, or the petitioner's

allegations required proof from outside the record, this Court has determined only that the petitioner was entitled to a hearing or opportunity to establish his claims. *E.g., Cash* v. *Culver, supra.* In the case at bar, the condition of the record before this Court enables the Court to determine that Petitioner is entitled to the writ of habeas corpus on remand.

The record before this Court establishes without dispute Petitioner's youth and ignorance at the trial, his indigence and inability to defend himself, and that he was taken advantage of. The only issues raised by Petitioner's allegations and not settled by the trial record are whether he requested and was denied counsel, and whether he waived court appointment of counsel.

Under the circumstances a request or demand for counsel, if made as Petitioner alleges, was unnecessary. In *Gibbs* v. *Burke, supra,* 337 U.S. 773 (1949), where petitioner had been convicted of a non-capital felony without having the assistance of counsel, the record showed neither a request for counsel by the petitioner nor an offer of counsel by the court, and the petitioner conducted his own defense., This Court stated that "a failure to request counsel does not constitute a waiver when the defendant does not know of his right to counsel", and held that the petitioner's constitutional right to a fair trial was denied. In this case, as in *Gibbs*, the conclusion is irresistible that Petitioner was too ignorant to know that he had a Federal right to counsel. Moreover, Respondent has conceded in this Court, in his Brief in Opposition to Petition for Writ of Certiorari (P. 5), that in view of the Texas law as it existed in 1944, it would have made no difference whether Petitioner requested the Court to appoint counsel:

> "Additionally, under the Texas Criminal Procedural Law in 1944 it made no difference whether or not Petitioner had asked the Trial Court to appoint counsel to

represent him, which is denied. Even had the record indicated such request, which it does not, Petitioner was being tried on a non-capital felony offense, which required no arraignment and no right to representation by counsel."

On the record now before this Court, it is clear that the Court of Criminal Appeals of Texas would not require further proof by Petitioner of his allegations that he requested counsel, was indigent and did not waive his Federal right to the appointment of counsel. In *Moore* v. *State*, 324 S.W. 2d 879, 880, 881 (Tex. Crim. App. 1959), that Court said:

"The record in this case affirmatively reflects that this appellant, an eighteen-year-old boy, was not represented by counsel either of his own choosing or by appointment by the court. There is an absence of any suggestion in this case that the trial court tendered or offered to appoint counsel for appellant, or that appellant was financially able to employ counsel. There is an absence of any evidence that appellant possessed sufficient education or was mentally alert to the point of being able to represent himself upon the trial of this case.

* * * * * *

"Giving effect to the decisions of the Supreme Court of the United States and the rule of law announced therein, we are constrained to agree that under the facts here presented this conviction must be reversed, because of the failure on the part of the trial court to appoint counsel for the appellant.

"While we have no statute in this state which requires the appointment of counsel for one on trial for an ordinary felony, the Supreme Court of the United States in a series of decisions has judicially determined

and held that failure to appoint counsel for one on tri
in a state court for an ordinary felony may constitut
a denial of due process, under the Fourteenth Amen
ment to the Constitution of the United States."

The state of the record in the *Moore* case was emphasize
by a dissenting opinion, 324 S.W. 2d at 881, 882, as follows

"* * * There is nothing in this record to show tha
appellant used any diligence to secure counsel of hi
own selection earlier; nothing to show that he desire
that the court appoint counsel for him * * *.

"The effect of the majority opinion is that, contrar
to its prior decisions, this Court announces the rule t
be that in all felony cases wherein the defendant is no
represented by counsel his conviction will be set asid
unless the record affirmatively shows that the defen
dant was financially able to employ counsel, and tha
he possessed sufficient education and mental alertnes
to the point of being able to represent himself upo
the trial."

Further development of the facts by the Court of Crimina
Appeals of Texas, before granting the writ of habeas co
pus, thus becomes unnecessary.

Petitioner has exhausted his remedies in the courts
Texas, and Respondent so concedes in this Court. Bri
of Respondent in Opposition to Petition for Writ of Cert
orari, P. 2.[1]

[1] The Court of Criminal Appeals of Texas has held that an ori
inal petition to that Court for the writ of habeas corpus is
proper remedy to prevent enforcement of an unappealed judgme
obtained under circumstances which constituted a denial of d
process under the Federal Constitution. *Ex parte Bush*, 313 S.W
2d 287, 166 Tex. Cr. R. 399 (1958) (non-capital felony convictio
after denial of court appointed counsel to presumptively insan
defendant, *held*, writ of habeas corpus granted ten years aft
conviction).

Conclusion

The Court of Criminal Appeals of Texas erred in refusing to give Petitioner an opportunity to establish the material allegations of his petition for writ of habeas corpus and in refusing to develop the facts and determine the issue raised by Petitioner as to denial of due process under the Fourteenth Amendment. Had the Court of Criminal Appeals considered the full record which is now before this Court, it would have been required, under this Court's decisions during the past twenty years, to grant Petitioner the writ of habeas corpus. The circumstances under which Petitioner went to trial, and the complexity of the legal problems which then arose, made it impossible for Petitioner to have a fair trial, without the assistance of counsel. This Court should now determine that Petitioner is entitled on the trial record to the writ of habeas corpus, and reverse and remand for further proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

PERCY D. WILLIAMS
Counsel for Petitioner
3100 Gulf Building
Houston 2, Texas.